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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 328

UNITED STATES TRUST COMPANY OF NEW YORK and FRANCES SEYMOUR BROKAW, as Executors of the last Will and Testament of GEORGE TUTTLE BROKAW, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND SUPPORTING BRIEF.

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UNITED STATES TRUST COMPANY OF NEW YORK and FRANCES SEYMOUR BROKAW, as Executors of the last Will and Testament of GEORGE TUTTLE BROKAW, Deceased,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

This Petition of United States Trust Company of New York and Frances Seymour Brokaw, as Executors of the last Will and Testament of George Tuttle Brokaw, deceased, by their attorney, Harry J. Ahlheim, seeking review by Writ of Certiorari of a decision of the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

Summary Statement of Matter Involved.

This application involves a Federal Estate Tax in the sum of $73,403.61, assessed against the Estate of George

Tuttle Brokaw, who died testate on May 28, 1935, a citizen and resident of the City, County and State of New York. The sole issue (R. 99) is whether the corpus of an *inter vivos* trust, established by him in 1929 (valued at $312,884.47 at the time of his death), was includible in his gross estate, under Section 302(d) of the Revenue Act of 1926 as more particularly amended by Section 804 of the Revenue Act of 1932 (see Appendix, *infra*). This application involves the construction and constitutionality, as applied, of said Section 804.

The Board of Tax Appeals excluded said trust fund from the gross estate, for the reason that there was an adequate and full consideration in money or money's worth for the trust transfer (R. 74). The Circuit Court of Appeals reversed the order of the Board and remanded the cause (R. 107).

Statement of the Case.

The material facts as stipulated (R. 89-99, 14-65) and found by the Board of Tax Appeals (R. 68-71), are as follows. The decedent died on May 28, 1935, survived by his first wife, Ann Clare Brokaw, and their infant daughter, Ann Clare Brokaw, ten years of age. He was at all times a resident of the State of New York (R. 90).

He and his first wife entered into a Separation Agreement on January 31, 1929 (R. 28-36). Among other things he agreed to pay her $2,500 per month for the term of her life, or at his option, to establish a trust in the principal sum of $425,000, the income of which should be payable to her during her life. She agreed that out of said payments, she would support herself and would assume the support of their daughter while the daughter resided with her. It was particularly agreed that he should not be required to

make any further payments for maintenance and support (except as to the daughter's school charges, medical bills, etc.). She expressly released and discharged the husband from all further liability, and also expressly agreed to indemnify and hold him harmless against any additional claim or liability. The amount of $2,500 per month was fixed by the parties as the amount reasonably required for the maintenance and support of the wife and daughter, and the parties contemplated that about one-third of the amount would be devoted to the maintenance and support of the daughter during her minority. By the Separation Agreement, he sought to make financial provision for the satisfaction and discharge of his legal obligation to support the wife and daughter (R. 92). The form of the trust agreement was submitted and approved by both parties, when the Separation Agreement was executed and delivered (R. 92).

After January 31, 1929, the wife instituted an action for divorce in Nevada and obtained an absolute decree of divorce on May 20, 1929. Said decree ratified and approved the Separation Agreement (R. 37-40), but the Court reserved jurisdiction to modify the provisions for the maintenance and support of the daughter during her minority, should it at any time appear necessary and proper to do so. There has been no such necessity (R. 95).

The husband paid said monthly sum of $2,500 up to and including May, 1929. Thereafter and on June 12, 1929, he exercised his option and delivered the Trust Agreement, together with securities having a fair market value of $414,324.50, to Trustees; the husband guaranteed no fixed amount of income, and the wife accepted the trust in lieu of all other payments to be made to her by the husband (R. 70-71, 97). In addition to the life income, the wife was

given a power of appointment by Will over $200,000 of the corpus (R. 44). The Trust Agreement contained a provision that the husband and his wife might jointly terminate, change, modify or revoke the trust, in which event the trust property should pass as he and she jointly directed (R. 51). It is this provision which brought the trust transfer within the possible scope of Section 302(d) of the Revenue Act of 1926.

At the time of the establishment of the trust, the decedent owned and possessed property having a fair market value of upwards of $1,425,000, including the securities ($414,324.50) which constituted the trust fund. The establishment of the trust was a bona fide transaction and was not intended to serve as a means or device to evade the imposition of any Estate Tax (R. 98). When the trust was established, the wife was twenty-six years of age and the daughter was four and one-half years of age. The then value of an annuity of $30,000 (being at the rate of $2,500 a month) payable to a person then twenty-six years of age, was $529,794.12. The securities constituting the trust fund had a fair market value of $312,884.47 at the date of the decedent's death. The Commissioner included that amount in the gross estate.

The Board of Tax Appeals, on the other hand, excluded said trust fund from the gross estate, upon the ground that the husband's obligation to support the wife and child would cease on his death, that her release of his obligation to support her and her assumption of the child's support were an adequate and full consideration in money's worth for the revocable trust transfer, and that the said consideration was not a relinquishment of any marital right in decedent's property or estate (R. 68-74).

The Circuit Court recognized that the 1929 transfer was made for a consideration in money's worth. However, it reversed the order of the Board, and held that a part (to be determined) of said trust fund should be included within the decedent's taxable estate, upon the ground that the consideration for the establishment thereof was (as to the wife's support) a relinquishment of a marital right in the decedent's property or estate, within the meaning of Section 804 of the Revenue Act of 1932, amending said Section 302(d). As to the balance of said trust fund (found not taxable), the Circuit Court of Appeals held that it would be necessary to determine the prospective yearly cost of the child's support when the trust was set up in 1929, and that a proportion of the trust fund based upon that cost should accordingly be excluded from the taxable estate, because to that extent the decedent received an adequate and full consideration in money or money's worth—in view of the fact that the wife agreed to assume the decedent's obligation to maintain and support the child during her minority (R. 103-107).

Questions Presented.

1. Whether Section 804 of the Revenue Act of 1932 (amending the Revenue Act of 1926) restricting the character of consideration, should be construed to apply to the trust transfer made in 1929, prior to the enactment of said Section.

2. If so applied, whether said Section 804 is not arbitrary and oppressive and in violation of the Fifth Amendment.

3. Whether Congress intended that said Section 804 should have retroactive effect upon a trust transfer made in 1929.

4. Whether said Section 804, amending Section 302(d) of the Revenue Act of 1926, should be construed to apply to the facts involved in the case at bar.

5. If so applied, whether the consideration for the trust transfer was of such character as to require the inclusion of part of said trust corpus in the decedent's gross estate at the time of his death on May 28, 1935.

6. Whether said revocable trust transfer was not governed solely by said Section 302(d), and whether the trust property was not thereby excluded from the decedent's gross estate for tax purposes, for all time.

7. Petitioners also reserve the right to review the Court's determination as to the measure, proportion and amount of the fund, to be excluded from the gross estate.

Reasons Relied On for the Allowance of the Writ.

1. The case involves important questions in the interpretation, construction and applicability of the Federal Estate Tax law which have not heretofore been decided by the Supreme Court, but which in the public interest and for the correct administration of the Federal Revenue laws, should now be settled and determined. The statute involved is Section 302(d) of the Revenue Act of 1926, as more particularly amended by Section 804 of the Revenue Act of 1932.

2. Section 302(d) of the Revenue Act of 1926 excluded from the decedent's taxable estate, a revocable trust transfer of property, resting upon an adequate and full consideration in money's worth. The Circuit Court of Appeals has decided that Section 804 of the Revenue Act of 1932 should be retroactively applied to a 1929 transfer, so as to

bring said property back into the decedent's taxable estate at his death. Said decision has decided an important question of Federal Law in a way probably untenable or in conflict with the applicable decisions of this Court, which question should now be settled by this Court. In the recent case of *Hassett* v. *Welch*, 303 U. S. 303, this Court considered the 1931 and 1932 amendments to Section 302(c) of the Revenue Act of 1926, and held that said amendments might not be retroactively applied to a trust transfer made prior to 1931. It was held that the death of the transferor after 1931 did not serve to make the transfer a taxable one. Furthermore, the decisions of this Court in the following cases indicate that said Section 804 may not be retroactively applied to a transfer made in 1929; and that the retroactive application of said Section 804 would be a violation of the Fifth Amendment. This important question of Federal Law should now be settled by this Court. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Coolidge* v. *Long*, 282 U. S. 582; *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89; *Helvering* v. *Helmholz*, 296 U. S. 93, 98; *White* v. *Poor*, 296 U. S. 98, 101, 102.

3. The case of *Helvering* v. *City Bank Co.*, 296 U. S. 85, involved the taxability of a revocable transfer in trust, made without consideration. However, this Court has not yet passed upon the question as to the effect of a revocable transfer, resting upon a proper consideration, and whether property so transferred, is excluded from the settlor's estate for all time.

4. The question as to the construction, scope and interpretation of said Section 804 and of the term "marital rights in the decedent's property or estate" is an important question of Federal Law which has not but which should be settled by this Court.

5. A decision of the questions involved in this case is desirable in order to remove the resulting confusion in the construction, interpretation and administration of said Section 302(d) as amended by said Section 804.

Prayer.

WHEREFORE PETITIONERS RESPECTFULLY PRAY that this Honorable Court review by Writ of Certiorari, directed to the United States Circuit Court of Appeals for the Second Circuit, the Decision and Decree of said Court in the case numbered and entitled on its Docket as No. 266, October Term 1939, "Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, against United States Trust Company and Frances Seymour Brokaw, Executors of the last Will and Testament of George Tuttle Brokaw, Respondents", and that all things necessary and incident thereto, including certification and transmission to this Court, of transcript of the Record and all proceedings in said Circuit Court of Appeals be done, and that said Decree and Judgment of the Circuit Court of Appeals may be reversed in so far as the same is adverse to your petitioners, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, New York, August 12, 1940.

HARRY J. AHLHEIM,
Counsel for Petitioners.

REEVES, TODD, ELY & BEATY,
Attorneys.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the United States Board of Tax Appeals is reported in 39 B.T.A. 783 (R. 68-74).

The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 111 F. (2d) 576 (R. 103-107).

Jurisdiction.

Jurisdiction to issue the Writ of Certiorari prayed for herein, is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; U.S.C.A. Title 28, Section 347.

The date of the Decree sought to be reviewed is May 15, 1940.

Statutes Involved.

The Statutes and House Committee Report involved, will be found in the Appendix, *infra.*

Statement of the Case.

A summary statement of the facts is found in the annexed Petition; and in the interests of brevity, the statement will not be repeated.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that any part of the property transferred in trust

in 1929 was includible in the decedent's taxable estate pursuant to the provisions of Section 302(d) of the Revenue Act of 1926, as amended by Section 804 of the Revenue Act of 1932.

2. The Circuit Court of Appeals erred in finding and holding that said amendment, Section 804, had any application to the trust transfer made in 1929. The fact that the decedent died in 1935 after the enactment of Section 804 could not serve to bring said property back into the decedent's taxable estate, in view of the fact that it had been lawfully excluded therefrom under the provisions of Section 302(d) of the Revenue Act of 1926.

3. The Circuit Court of Appeals erred in finding and holding that the wife's discharge of the husband's obligation to support her, was a marital right in decedent's property or estate, within the meaning of said Section 804. The fact is that said obligation ceased upon his death.

4. The Circuit Court of Appeals erred in finding and holding that the husband granted the wife an annuity in consideration of the wife's release of her marital right of support, and to that extent the release was not a valid consideration under said Section 804. The fact is that the agreement for monthly payments was evidence of the husband's continuing obligation, and said trust transfer was made to compromise and discharge the husband's general obligation to support the wife and child, which obligation would continue only up to the time of his death.

5. The Circuit Court of Appeals erred in finding and holding that the wife's discharge of the marital right of support was in the nature of a property right, coming into existence at the time of the husband's death. The fact is

that the marital right of support was personal right which would cease at his death.

6. The Circuit Court of Appeals erred in failing to find and hold that if retroactively applied, Section 804 would violate the Fifth Amendment.

7. The Circuit Court of Appeals erred in failing to find and hold that the revocable trust transfer was non-testamentary in character and status and was taken out of the reach of the Federal Tax law under the provisions of Section 302(d) of the Revenue Act of 1926.

8. The Circuit Court of Appeals erred in failing to find and hold that said Section 804 violated the Fifth Amendment as applied to the facts and circumstances involved in the case at bar.

9. The Circuit Court of Appeals erred in failing to find and hold that Section 804 was intended by Congress to apply only to transfers, made subsequently to the enactment of said Section.

10. The Circuit Court of Appeals erred in reversing the Order of the Board of Tax Appeals and remanding the cause.

Summary of Argument.

Having been made in 1929 for an adequate and full consideration in money or money's worth, the revocable *inter vivos* trust transfer was excluded from the settlor's estate for all time, by the exception found in section 302(d) of the Revenue Act of 1926. If the amendment, enacted in 1932 as Section 804 of the Revenue Act of 1932, is retroactively applied to affect said transfer, it is in violation of the Fifth Amendment. An examination of Section 804 and

a study of the applicable rules of construction and of the House Committee Report indicates that Congress had no intention to give said Section retroactive effect.

As a matter of fact, the consideration for the trust transfer in 1929 was a discharge of the husband's continuing obligation to support his wife and child. This obligation would cease at his death. The wife's release of right of support (and of course, her assumption of the child's support) during the husband's life, was not a relinquishment by her of any dower or other marital rights in the decedent's property or estate, within the meaning of Section 804.

ARGUMENT.

Preliminary Statement.

The Circuit Court of Appeals recognized that the trust transfer was made for a consideration in money's worth within Section 302(d), to wit, (a) the discharge of the husband's continuing obligation to support his wife, and (b) her assumption of his continuing obligation to support the minor child. In other words, if the trust transfer was governed only by Section 302(d) of the Revenue Act of 1926, it was brought within the exception, contained in that Section. This exception excludes a revocable trust transfer from Estate Tax, provided it was made for an adequate and full consideration in money's worth.

However, the Circuit Court of Appeals went on to hold (R. 104) that, as to the part of the trust set up for consideration (a) above, the trust transfer lost its non-taxable status and was brought back within the reach of the Estate Tax law, by the amendment (restricting the nature of consideration), enacted in 1932 as Section 804 of the Revenue Act of 1932. Accordingly, this brief is devoted primarily

to said Section 804. (As to the part of the trust set up for consideration (b) above, the Circuit Court of Appeals held (R. 105) that it was non-taxable, and remanded the proceeding to the Board of Tax Appeals so that the amount of such exempt part might be computed. As to such part, set up in consideration of the wife's agreement to assume the support of the child, the Court held that there was an adequate and full consideration in money's worth which consideration was not a "release of any marital right"; and that therefore the trust transfer to this extent, was at all times within the exception or exclusion clause, found in Section 302(d).

Throughout this brief, George Tuttle Brokaw will be referred to as the husband or decedent; Ann Clare Brokaw will be referred to as the wife.

POINT I.

Section 302(d) of the Revenue Act of 1926 excluded the 1929 *inter vivos* trust transfer from the operation of the Estate Tax Law. If the Amendment, Section 804 of the Revenue Act of 1932 is retroactively applied to reach said transfer, it is arbitrary and oppressive and in violation of the Fifth Amendment of the Constitution.

The husband and wife entered into a binding contract in 1929, relying on the estate tax law, then in force. By this contract the parties adjusted their affairs and lawfully compromised and determined how much the husband should be obligated to contribute (either by monthly payments or by the establishment of a trust fund), and how much the wife should be entitled to receive for the support of herself and for her assumption of the child's support. *Galusha* v.

Galusha, 116 N. Y. 635, 643; *Winter* v. *Winter,* 191 N. Y. 462, 470.

The obligation to support them, resulting from the marriage relationship, would cease upon his death. After his death there would be no continuing obligation against his property or estate. *Wilson* v. *Hinman,* 182 N. Y. 408, 412; *Barnes* v. *Klug,* 129 App. Div. 192, 195; *Rice* v. *Andrews,* 127 Misc. 826.

By the Separation Agreement, the husband converted his continuing obligation into a promise either (a) to pay the wife a fixed sum per month during her lifetime, or (b) to establish a trust with income payable to her during her life. She released him from all liability to provide support and she assumed the support of the child (R. 43-56). On June 12, 1929, he set up the trust fund with income payable to the wife, which she accepted in full satisfaction and discharge of the husband's obligation (R. 31, 32). The husband and wife were free to reduce to a certainty, the amount of money which the husband would pay to discharge an obligation, which might cost him more or less than what he had agreed to pay. Thereafter there was no continuing obligation upon the husband nor did he guarantee any amount of income.

The parties estimated and fixed the monthly requirement of the wife and daughter at $2,500 (R. 92). On the normal expectancy of the wife's life and computed according to the tables of mortality, at the age of twenty-six years, the value of such monthly payments was the sum of $529,794.12 (R. 97). This was evidence of the "money's worth". The husband settled his outstanding obligation, using part of his property ($414,324.50) to do so. In place of a continuing monthly obligation or in place of the establishment of the trust fund, he might have paid to the wife a lump sum of money to discharge the obligation. *Green-*

field v. *Greenfield,* 161 App. Div. 573, 575; *Gewirtz* v. *Gewirtz,* 189 App. Div. 483; *Grissler* v. *Grissler,* 209 App. Div. 480; *Pye* v. *Pye,* 167 App. Div. 951. As a matter of fact, upon a mathematical computation, the establishment of the trust fund saved for him and his estate more than $100,000, to wit, the difference between the said sums of $414,324.50 and $529,794.12. Consideration is not confined to something coming in; compromising the amount of one's liability may be an adequate and full consideration. *Commissioner* v. *Kelly's Estate,* 84 F. (2d) 958, 964, Cert. denied 299 U. S. 603; *United States* v. *Mitchell,* 74 F. (2d) 571.

There was accordingly an adequate and full consideration in money or money's worth for the trust transfer. Section 302(d) provided that (notwithstanding the power of revocation) where the trust transfer was made for such consideration, the property was no longer includible in the settlor's estate. Section 804 of the Revenue Act of 1932 provided that relinquishment of dower and other rights should not be considered to any extent, a consideration in money or money's worth. The Circuit Court held that this amendment in 1932 had such effect, as to bring part of the trust fund back into the decedent's taxable estate.

Section 804 was a restrictive amendment, limiting the character of "consideration" for tax purposes. It would be an arbitrary and oppressive act and a violation of the Fifth Amendment, to apply such 1932 amendment to a transfer, made and executed in 1929. Although it was a revocable transfer, which must necessarily result in a shifting of economic benefits at the transferor's death, nevertheless, under the existing law in 1929, such a transfer upon an adequate and full consideration was regarded as a completed transfer and was not deemed to be testamentary in character; and such property had a status, entirely without the scope of the Estate Tax law. In the case of *Helver-*

ing v. *City Bank Co.*, 296 U. S. 85, 92, it was held that by the enactment of Section 302(d), Congress had created a "fictitious status" so that the establishment of a revocable trust should be deemed "testamentary in character", but added that there are "limits to the power of Congress to create a fictitious status". We submit that when the revocable transfer was made for an adequate and full consideration in money or money's worth, then there could be no fear of estate tax "evasion" and the property so transferred was for all time taken out of the reach of the taxing statute. By the exception found in Section 302(d), Congress expressly recognized that such a revocable transfer, based upon an adequate and full consideration in money's worth, was not "testamentary in character".

Congress recognized this same principle in Section 811(i) of the Internal Revenue Code (formerly Section 302(i) of the 1926 Act), which provides that where transfers, etc. (which are to be included in gross estate) were made for a consideration in money or money's worth, then only the excess of the fair market value over the value of the consideration, is to be included in the gross estate. If there is no "excess", then there is no gross estate. The same principle is recognized in Section 811(e) of the Code.

The Circuit Court of Appeals in its decision held that the husband had no "assurance when he set up the trust, that it would not be included in his gross estate" (R. 105). We urge that in 1929 when he set up the trust, as a result of a binding contract, he had every possible assurance that the property was no longer part of his taxable estate. Congress in 1926 had specifically excluded property, so transferred by revocable trust agreement. The effect of the transfer, resting upon an adequate and full consideration, was to take the property out of the decedent's gross estate, as in the case of a gift.

In the case of *Blodgett* v. *Holden*, 275 U. S. 142, it was held to be wholly unreasonable that one who in entire good faith and without the slightest premonition of such consequences disposes of his property by gift, should thereafter be required to pay a tax for so doing. The case of *Welch* v. *Henry*, 305 U. S. 134, 147, 148 is to the same effect.

The Circuit Court of Appeals held (R. 104) that Section 804 was a "definitory amendment" and that Section 302(d) as so amended first applied to the testator's estate when he died in 1935; and that before 1935, Section 804 had given a *new* meaning to the statute. In other words, the Circuit Court of Appeals in effect said that although the transfer was made and executed in the year 1929, the definition of "consideration" applicable thereto, might be changed from time to time, and that the particular definition which happened to be in force at the time of death, was the one which should govern, rather than the definition which was in effect at the time the transfer was made. If the ruling of the Circuit Court of Appeals is upheld, then a non-taxable transfer may readily be turned into a taxable transfer by retroactive legislation. The only attempt to define "consideration" in Section 302(d) (as it stood in 1929) was the provision that it must be "an adequate and full consideration in money or money's worth". It would be unreasonable thus to reach back by a restrictive "definitory amendment" in 1932.

In the leading case of *Lewellyn* v. *Frick*, 268 U. S. 238, 251, 252, this Court laid down the general rule that doubts as to constitutionality are avoided by construing a statute as referring only to transactions taking place after it was passed; and in that case this Court approved that general principle "when to disregard it would be to impose an unexpected liability, that if known might have induced those concerned to avoid it and to use their money in other ways".

So we urge that Congress, having given the 1929 transfer a non-testamentary character, could not lawfully in 1932, reach back to make it testamentary in character and to make it a taxable event. Once the property was so transferred upon an adequate and full consideration, it was removed from the scope of the Estate Tax law, and it would be unreasonable to include it in the decedent's gross estate for tax purposes, by the enactment of *subsequent* restrictive legislation. Any such legislation in 1932 would arbitrarily ignore recognized rights to enjoy and transfer property and would be violative of the Fifth Amendment. Any retroactive operation of a statute, the effect of which is to tax a past bona fide transfer, not testamentary in character, is "so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment". *Nichols* v. *Coolidge*, 274 U. S. 531, 542. See also, *Coolidge* v. *Long*, 282 U. S. 582; *Helvering* v. *Helmholz*, 296 U. S. 93, 98; *White* v. *Poor*, 296 U. S. 98, 101, 102; *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89; *Hassett* v. *Welch*, 303 U. S. 303.

POINT II.

Congress did not intend the Amendment, Section 804 of the Revenue Act of 1932 (restricting consideration for a transfer) to have retroactive effect upon a transfer made in 1929.

There is nothing in the wording of the amendment, indicating that Congress intended that it should have retroactive application. On the other hand, the Revenue Act of 1932 referred to the amendment as "a new sentence" to be added to the Revenue Law (see Appendix, *infra*). The new sentence is to the effect that the relinquishment "shall not be considered" to any extent, a consideration in money or

money's worth. This language, adopting the future tense, clearly indicated prospective application. If Congress had intended any retroactive application, it would have so stated, or it might have used the words "is not to be considered". Congress was here dealing with *contractual rights,* that is, consideration for valid executed transfers; in 1932 it could not have intended to limit the scope of "consideration" as theretofore relied upon in a 1929 contract.

The decision of this Court in the case of *Hassett* v. *Welch,* 303 U. S. 303, is significant. Section 302(c) of the Revenue Act of 1926 as amended, taxed certain transfers, made "at any time". This Court held that said expression "at any time" would not embrace transfers, consummated before the passage of the statute. In the light of this ruling, certainly in the case at bar where there was no "time" provision of any kind found in Section 804, said latter amendment must be construed to have no retroactive effect.

Rules of Construction.

There are several applicable rules of construction.

1. Statutes must be construed prospectively, and if there is to be retroactive operation, or change of status, the declaration of retroactivity must be "clear, strong and imperative". See, *Shwab* v. *Doyle,* 258 U. S. 529, 534; *Blodgett* v. *Holden,* 275 U. S. 142, 149; *United States* v. *Magnolia Co.,* 276 U. S. 160, 162; *Hassett* v. *Welch,* 303 U. S. 303, 314; *Jacobus* v. *Colgate,* 217 N. Y. 235, 240.

2. Statutes are not to be considered as applying to cases which arose before their enactment. To disregard this rule "would be to impose an unexpected liability, that

if known might have induced those concerned to avoid it and to use their money in other ways". See, *Lewellyn* v. *Frick,* 268 U. S. 238, 252; *Haggar Co.* v. *Helvering,* 308 U. S. 389, 400.

3. An Estate Tax, being a special tax, must be construed strictly against the Government, and in favor of the taxpayer. In the leading case of *Gould* v. *Gould,* 245 U. S. 151, it was held at page 153:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

4. If there is any ambiguity, it should be resolved in favor of the taxpayer. *Hassett* v. *Welch,* 303 U. S. 303, 314; *Corporation of America* v. *McLaughlin,* 100 F. (2d) 72; *Cloister* v. *United States,* 100 F. (2d) 355.

5. Tax cases are governed "by equitable principles." *Stone* v. *White,* 301 U. S. 532; *Helvering* v. *Lazarus,* 308 U. S. 252, 255.

House Committee Report.

The House Committee Report No. 708 (see Appendix, *infra*) referred to Section 804 as an *amendment of Section 302(d).* (The Finance Committee Report No. 665 of the Senate was similar in form.) There was no suggestion in the Report that the statute was intended to have retroactive effect. As the statute was designated an "amendment", the Committee must have intended to make some change in the form of Section 302(d); and it follows that

the Committee must have intended that the amendment should apply only to future contracts, resting upon such relinquishment of property rights. It is to be noted that the Committee Report used the word "excludes" and stated that *prior to 1932,* relinquishment of dower had constituted "a consideration for an otherwise taxable transfer". The plain inference is that *after 1932,* the relinquishment of such property rights would no longer serve as "a consideration for an otherwise taxable transfer." In other words, after 1932, a waiver of such rights would no longer be an adequate and full consideration in money's worth.

Other portions of the Revenue Act were amended at the same time, by Sections 803 and 805 of the Revenue Act of 1932. A study of the language used and the explanation given in the Committee Report (see Appendix, *infra*) with respect to these Sections 803, 804 and 805, is highly significant and indicates that as to Sections 803 and 805, the new legislation was intended to *clarify* the existing law. However, as to Section 804, there is no suggestion that it was intended *to be retroactive or to clarify* the existing law.

(a) The Committee Report, in dealing with the preceding Section 803 of the Revenue Act of 1932 (amending Section 302(c) of the Revenue Act of 1926 as to future estates), specifically stated that the purpose of the amendment was "to clarify" the existing law, and then went on to say—"This is a clarifying change and does not represent new matter."

(b) The Report, in dealing with the succeeding Section 805 (amending the existing law as to deductions), specifically stated "This amendment, with one exception, merely clarifies the existing law * * *. The principal changes made are * * * (4) A clarifying provision limiting the re-

quirement of an adequate and full consideration in money or money's worth to liabilities founded on contract."

If the Committee had any thought or intent of enacting the intervening Section 804 as a retroactive statute or as clarifying the existing law, the Report would have noted this fact, just as it did in connection with Sections 803 and 805. The House Committee Report, dealing with Section 804, refers to the relinquishment of dower "or other marital rights in decedent's property"; and then cites an example of a wife who was entitled to one-third of her husband's estate "of which she cannot be deprived by Will without her consent." Clearly, Congress intended to limit Section 804 to the wife's property rights which come into effect upon her husband's death.

The expression of intention by Congressional Committees may be resorted to, in construing the statutes to which they relate. See, *Humphrey's Executor* v. *United States*, 295 U. S. 602, 624; *United States* v. *Great Northern Railway Co.*, 287 U. S. 144, 154.

The question here is, —what did Congress intend? We urge that Section 804 of the Revenue Act of 1932 was an amendment, effecting a change in existing tax law, and that Congress did not intend that it should have retroactive operation upon a non-taxable transfer, made in 1929.

POINT III.

The consideration for the trust transfer was not a relinquishment by the wife of any dower or other marital rights in the decedent's property or estate, within the meaning of Section 804 of the Revenue Act of 1932.

When the parties made the Separation Agreement and also agreed upon the amount and form of the trust transfer on January 31, 1929 (R. 91, 92), the husband was legally obligated to support the wife and child, which continuing obligation or duty would cease upon his death. *Wilson* v. *Hinman,* 182 N. Y. 408. In *Barnes* v. *Klug,* 129 App. Div. 192, 195, it was held that "This duty (marital duty of support) being upon him only during his life time, the courts cannot compel him to make provision for its continuance after his death." He was seeking some way to fix and to compromise and discharge that continuing obligation. As a result of their negotiations, the wife agreed to accept (1) $2,500 a month for her own support and for her assumption of the child's support, or (2) the establishment of a trust fund in the sum of $425,000 with income payable to her for the same purposes. The husband could exercise either option. By agreement, he might have paid his wife a lump sum of money to discharge that obligation. The husband, by the trust transfer, compromised and discharged his obligation to his wife, just as he might have compromised and discharged any other obligation during his life. Such consideration was not the "relinquishment" of any marital right in the decedent's property or estate.

Section 804 refers to dower or "statutory estate created in lieu of dower or curtesy, or of other marital rights in

the decedent's property or estate." Upon the familiar principle of construction of *ejusdem generis,* these terms refer to *property* rights which come into being because of and upon a husband's death. On the other hand, the right to support was a marital right or duty (arising out of the marriage relationship), which continued only during the husband's lifetime. As the Board of Tax Appeals very pointedly said, the right of the wife and child to support "was a right which would cease at his death" (R. 74). Clearly it was not a property right or a statutory estate, like dower, which came into effect upon his death, and it was not a right in decedent's property or estate. At most it was a personal right against the husband *while he was alive.*

It is also to be noted that Section 804 expressly used the words "in decedent's property or estate". The use of these words indicated that Congress intended to include only *property* rights which come into existence at *death* and not a personal claim for support during decedent's life, which claim *terminates* upon the husband's death.

Section 302(b) of the Revenue Act of 1926 had included dower and any statutory substitutes, in the gross estate (because the generating source of their creation, is the decedent's death). So Section 804 of the Revenue Act of 1932 was aimed at the relinquishment of similar property rights, arising upon a husband's death. It provided that the relinquishment of these rights, should not serve as consideration for an *inter vivos* transfer. A husband and wife could not thus provide an escape from Federal Estate Tax.

Moreover, before the trust was established on June 12, 1929, the wife had procured a Nevada divorce decree whereunder the financial obligation of the husband (fixed

by the Separation Agreement) became further fixed by a Judgment of Court; and the Court approved the establishment of the trust in settlement of that obligation. So far as the wife was concerned, the establishment of the trust was a complete compromise and settlement of his financial obligation to her, fixed by the divorce Decree. *Sweeney* v. *Sweeney,* 42 Nev. 431; *Helvering* v. *Fuller,* 60 Sup. Ct. Rep. 784. Certainly the discharge from such judicial obligation was not a relinquishment by the wife of any dower right or of any statutory estate or of any other marital right in decedent's property or estate.

In 1929 the husband, by Will effective upon his subsequent death, could have lawfully disposed of all of his property (except wife's dower) to the exclusion of the wife and child. *Newman* v. *Dore,* 275 N. Y. 371; Stipulation, R. 94. In the Separation Agreement the wife released dower rights in real property, valued at $20,591.85 (R. 93, 94). However, this was an insignificant amount, compared to the entire amount involved and the provision was a normal one in a separation agreement. In any event, the real consideration for the trust transfer was and is to be measured by the discharge of the husband's obligation to support his wife and her assumption of the support of the child. She accepted the trust income in full satisfaction and discharge of the obligation. As appears from the Separation Agreement (R. 28), the parties were primarily providing for "support and maintenance". With the exception of said inchoate right of dower, the wife had no rights in the decedent's property or estate to relinquish, and it has been so stipulated (R. 94). As was said by the Board of Tax Appeals, the discharge of the husband's obligation, upon a mathematical basis, was worth at least, $414,324.50 (the value of the securities transferred). This was the evidence of the money's worth of the consideration

for the trust transfer, and operated to exclude the whole trust property from the decedent's estate.

The decision of the Circuit Court of Appeals in the case at bar rested largely upon a decision made by the same Court several weeks earlier in the widely different case of *Meyer* v. *Helvering,* 110 F. (2d) 367. This was a so-called "deduction" case, and the Circuit Court of Appeals attempted to spell out some similarity between that case and the case at bar. We submit that there is no such similarity. Here the real point at issue is whether for purposes of estate taxation, said trust fund may be brought back and *included* in the decedent's gross estate. The so-called "deduction" cases provide no rule or principle to determine the *extent* of a decedent's gross estate. "Deductions are matters of legislative grace", dependent upon the law at the time of death, and they lay down no rule to determine what property should or should not be *included* in the gross estate. See *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435; *Woolford Realty Co.* v. *Rose,* 286 U. S. 319; *Empire Trust Co.* v. *Commissioner,* 94 F. (2d) 307.

The last named case is an excellent example where the Court declined to recognize as a deductible claim, the sum of $50,000 paid to the decedent's widow pursuant to an ante nuptial agreement, in lieu of dower. There is no constitutional right to be preserved in the case of deductions.

In the case at bar, we have no such question of deductions. The question here is whether an *inter vivos* trust fund, having once been excluded from the decedent's estate by virtue of Section 302(d) of the Revenue Act of 1926, may thereafter be subjected to Estate Tax by the application of Section 804 of the Revenue Act of 1932. Items of deduction must be determined according to the law at the time of a decedent's death. The inclusion or exclusion of

this trust property must be determined in accordance with the law at the time of the trust transfer.

The Circuit Court of Appeals dealt with the question of the exclusion of the trust fund, as though it were a claimed annuity deduction. The fact is, that there was no outstanding claim against the decedent by the wife at the time of his death, either by way of annuity payments, guarantee or otherwise. Her claim had been finally settled and compromised in 1929, by the trust transfer of property. The consideration for this transfer was the discharge of the husband's continuing obligation. This was not a relinquishment of a right in the deceased husband's property or estate. Her release of the personal right of support and her assumption of the child's support, were an adequate and full consideration in money's worth.

Conclusion.

For all the reasons advanced in this brief, a Writ of Certiorari should issue to review the Decision and Decree, as prayed for in the foregoing Petition.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 (as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680). The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States * * *.

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy; * * *.

* * * * * *

(d) (as amended by Section 401 of the Revenue Act of 1934 * * *) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (U. S. C., Title 26, Sec. 411.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth'." (U. S. C., Title 26, Sec. 412.)

Report No. 708 of the Ways and Means Committee to the House of Representatives, 72nd Congress, First Session, Pages 46, 47, 48:

SECTION 803. FUTURE INTERESTS.

The purpose of this amendment to section 302(c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. * * *

* * * * * *

SECTION 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

This amendment excludes, in determining "consideration in money or money's worth," the value of a relinquished, or a promised relinquishment of, dower, curtesy, or other marital rights in decedent's property. Section 302(a) and (b) of the 1926 act require the value of such an interest to be included in the gross estate, and, if its value may, in whole or in part, constitute a consideration for an otherwise taxable transfer (as has been held to be so), or an otherwise unallowable deduction from the gross estate, the effect produced amounts to a subversion of the legislative intent expressed in section 302(a) and (b).

For example, a decedent dies leaving an estate of $1,500,000 (after payment of all charges), and under the State law the surviving spouse is entitled to one-third, or $500,000, of which she can not be deprived by

will without her consent. Under existing law, the estate is entitled to no deduction on account of her statutory rights, but, if she and decedent had entered into a contract by which she was to receive from his estate a stated sum in consideration of a waiver of her statutory rights, the amount due her under the contract might be held a deductible claim against the estate as having been contracted for an adequate and full consideration in money's worth, namely, the value of her waived marital rights.

SECTION 805. DEDUCTIONS.

This amendment, with one exception, merely clarifies the existing law so far as it relates to an important group of deductions allowable in computing the net estate subject to estate tax. The principal changes made are:

(1) * * *

(2) A clarifying provision to remove any question as to the deductibility of property taxes which did not accrue until after decedent's death. Such taxes are not claims nor administration expenses, and moreover are allowed for income-tax purposes.

(3) * * *

(4) A clarifying provision limiting the requirements of an adequate and full consideration in money or money's worth to liabilities founded on contract. The existing law might be open to a construction under which no claim against the estate would be deductible unless supported by an "adequate and full consideration in money or money's worth," but the real intent could hardly have been to deny the deduction of liabilities imposed by law or arising out of torts, and the amendment whereby the requirement of a consideration applies only where the liability is founded on contract is designed to clear up any doubt which may be thought to exist.



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258372—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 328

UNITED STATES TRUST COMPANY OF NEW YORK AND FRANCES SEYMOUR BROKAW, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE TUTTLE BROKAW, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 68–74) is reported in 39 B. T. A. 783. The opinion of the Circuit Court of Appeals (R. 103–107) is reported in 111 F. (2d) 576.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1940. (R. 107–108.) The

petition for a writ of certiorari was filed August 13, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pursuant to a separation agreement ratified in a divorce decree, the decedent in 1929 created a trust to pay income to his former wife during her life for her support and that of their minor child. The trust agreement provided that the decedent and his wife might modify or revoke the trust in whole or in part. He died in 1935.

The question presented is whether that portion of the trust allocable to the decedent's wife, which would otherwise be included in his gross estate under Section 302 (d) of the Revenue Act of 1926, is to be excluded as a transfer "for an adequate and full consideration in money or money's worth." The answer to this question depends upon the applicability and validity of Section 804 of the Revenue Act of 1932, which provides that a relinquishment of dower, etc., or of other marital rights shall not be considered such consideration.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

The material facts as stipulated (R. 89–99, 14–65) and found by the Board of Tax Appeals (R. 68–71) are as follows:

The decedent died on May 28, 1935. He was survived by his former wife, Ann Clare Brokaw, whom he married in 1923, and their daughter, Ann Clare Brokaw, born in 1924, who lived with her mother. (R. 69, 90.)

In a separation agreement dated January 31, 1929, the decedent agreed among other things to discharge certain debts of his wife and to pay her $2,500 per month during her life. The money was to be used for her own support and maintenance and also for the support, maintenance and education of their daughter. Divorce and remarriage were not to affect the provisions of the agreement. The monthly payments were to be a charge upon the estate of the husband in case he predeceased his wife. The wife released all of her rights in the estate of her husband. The agreement contained the following provision (R. 69–70):

> In the event, however, that the husband shall at any time hereafter establish a trust in the principal sum of Four Hundred and twenty-five thousand ($425,000) Dollars, the income of which shall be payable to the wife during her life, then from and after the date that such trust is established, the obligation of the husband and of his estate to make the

> aforesaid payment of Twenty-five hundred ($2500) Dollars a month shall cease, and the income from the said trust shall be accepted by the wife in full satisfaction and discharge of the obligation of the husband to make the aforesaid monthly payments, and the provisions of this agreement with reference to the application of the aforesaid monthly payments shall apply with full force and effect to the income from the said trust. Such trust may be established by the husband during his lifetime, or by will, or by instrument executed during his lifetime, which becomes effective as to the trust upon the death of the husband.
>
> For the purpose of said trust the husband may deposit securities, and such securities shall be valued at the market value as of a date to be agreed upon between the parties in writing; * * *.

The amount of $2,500 per month was fixed by the parties as the approximate amount reasonably required for the support of the wife and daughter, in accordance with their station in life and with the decedent's ability to furnish such support. The parties contemplated that about one-third of the amount would be devoted to the support of the daughter during her minority. The decedent paid his wife $2,500 per month for February, March, April, and May, 1929. (R. 70.)

The wife after January 31, 1929, instituted an action of divorce in Nevada and obtained an abso-

lute decree of divorce from the decedent on May 20, 1929. The decree of the Nevada court ratified and approved the separation agreement and made it enforceable as a part thereof. The decedent then notified his wife that he intended to establish the trust and the two agreed that certain securities should constitute the principal of the trust fund. He delivered the trust agreement on June 12, 1929, to the Guaranty Trust Company and to his wife as the trustees named therein, together with the securities. The fair market value of the securities placed in the trust at the time of its creation was $414,324.50. The wife accepted the trust in lieu of all other payments to be made to her by the decedent. (R. 70–71, 94–96.)

The trust income was payable to the wife during her life, and she was given a power of appointment by will over $200,000 of the corpus. The balance of the corpus, or the entire corpus in case there should be no valid exercise of the power of appointment, was to go to the daughter at the death of the wife or to her lawful issue, if any. If she should leave no issue, then the corpus was to go to the decedent, or as he should appoint by will. The trust agreement contained a provision that the decedent and his wife might terminate, modify, alter, or revoke the trust in whole or in part. (R. 71.)

The wife was twenty-six years of age when the trust was established. The daughter was then four

and one-half years of age. The then value of an annuity of $30,000 payable to a person then twenty-six years of age was $529,794.12. (R. 71.)

The decedent made no further monthly payments to his wife after May, 1929, but thereafter the wife received the net income of the trust. The gross income of the trust varied from $22,097.32 in 1931 to $13,679.89 in 1936. The securities constituting the trust fund were of the fair market value of $312,884.47 at the date of the decedent's death. The Commissioner included that amount in the gross estate. (R. 71.)

Upon review, the Board reversed the Commissioner, holding that no part of the corpus was to be included in the gross estate. The court below reversed; however, it did hold that the portion of the trust allocable to the support of the child was not to be included, and it remanded the case for a finding as to the value of that portion. (R. 107.)

ARGUMENT

The Commissioner included the corpus in the decedent's gross estate under Section 302 (d) of the Revenue Act of 1926, as amended, since the trust instrument reserved (R. 51, 71) to the decedent the right to modify, alter or revoke the trust at any time in conjunction with his divorced wife. Section 302 (d) specifically requires that there be included in a decedent's gross estate any property of which he has made a transfer "where the enjoy-

ment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *." And this Court has held that these provisions are applicable and constitutional even where the other person is a beneficiary. *Helvering* v. *City Bank Co.*, 296 U. S. 85.

Petitioners seek to escape the tax upon the sole ground that Section 302 (d) is by its own terms inapplicable here, since they assert that the transfer was made "for an adequate and full consideration in money or money's worth." But Section 804 of the Revenue Act of 1932 (see Appendix, *infra*) added a new provision to the title containing Section 302 (d), and provided that for the purposes of that title "a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'" The decedent herein died nearly three years after the enactment of the foregoing amendment.

The Circuit Court of Appeals ruled that the relinquishment of the annuity was founded upon marital rights of the type specified in the amendatory provisions. It held, therefore, that in the circumstances those provisions applied to such a re-

linquishment. The court's conclusion on this point seems clearly correct, and there are no decisions to the contrary.

Petitioner's primary complaint seems to be, not that the amendatory provisions were held applicable to this type of situation, but rather that they were held applicable here where the trust was established prior to their enactment. But the identical amendatory provisions were applied with respect to a contract executed before their enactment in *Meyer's Estate* v. *Commissioner,* 110 F. (2d) 367 (C. C. A. 2d),[1] and this Court denied certiorari on June 3, 1940, No. 1004, 1939 Term. There is no additional reason for further review herein.

The decision below is clearly correct. Although the new provisions were enacted in 1932, the decedent did not die until 1935. It was then, for the first time, that the statute had any impact upon the transaction in question. Moreover, since the new provisions were really only a clarifying or "definitory" amendment (R. 104), and since the petitioners are in essence seeking the benefit of a deduction, there is completely absent that arbitrariness or caprice that might otherwise call into play the due process clause of the Fifth Amendment.

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[1] *Accord: Empire Trust Co.* v. *Commissioner*, 94 F. (2d) 307 (C. C. A. 4th); *Sheets* v. *Commissioner*, 95 F. (2d) 727 (C. C. A. 8th).

CONCLUSION

There is no conflict of authority and no sufficient reason for further review. The petition should be denied.

Respectfully submitted,

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AUGUST, 1940.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States.
>
> * * * * *
>
> (b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;
>
> * * * * *
>
> (d) [as amended by Section 401 of the Revenue Act of 1934] (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * [U. S. C., Title 26, Sec. 411.]

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.
>
> Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth'." [U. S. C., Title 26, Sec. 412.]

Treasury Regulations 80 (1937 Ed.):

Art. 14. *Dower and curtesy.*—The provision of section 302 (b) includes dower and curtesy and all interests created by statute in lieu thereof, although the estate or interest so created may differ in character from dower or curtesy. The effect of the provision is to require the inclusion of the full value of the property, without deduction of the value of the interest of the surviving husband or wife, and without regard to the time when the right to such an interest arose. * * *

Art. 15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, * * *.

* * * * *

To constitute a bona fide sale for an adequate and full consideration in money or money's worth the transfer must have been made in good faith, and the price must have

been an adequate and full equivalent reducible to a money value. If the price was less than such a consideration, only the excess of the fair market value of the property (as of the date of decedent's death, or as of the applicable date under such an election as is mentioned in the last preceding paragraph) over the price received by the decedent should be included in ascertaining the value of the gross estate. For the purposes of the tax a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in decedent's property or estate, is not to any extent a consideration in money or money's worth.

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Art. 20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subdivision (d) of section 302 of the Revenue Act of 1926, as amended, embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See article 15.)

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(b) *Taxability.*—The property or the interest or interests therein so transferred shall be included in the gross estate if coming within any one of the following paragraphs:

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(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4.01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the decedent's death occurred at any time subsequent to the transfer, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

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U. S. GOVERNMENT PRINTING OFFICE: 1940